A **SITHRADEVI NAGALINGAM v. MASDAR DARMAN & ANOR; MAJLIS PEGUAM MALAYSIA (INTERVENER)**

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
NALLINI PATHMANATHAN FCJ
B MARY LIM FCJ
[CIVIL APPEAL NO: 02-33-04-2017(W)]
25 JANUARY 2021

C ***LEGAL PROFESSION:*** *Disciplinary proceedings – Complaint against solicitor – Disciplinary Committee ('DC') proceeded with hearing in absence of solicitor – Whether solicitor given proper notification of hearing date – Whether solicitor given proper explanation for absence – Whether solicitor given right to be heard – Whether there was breach of fundamental rule – Legal Profession Act 1976, ss. 100(1)(b), 109 & 138*

D ***LEGAL PROFESSION:*** *Disciplinary proceedings – Complaint against solicitor – Disciplinary Board struck solicitor off Roll of Advocates and Solicitors upon recommendation of Disciplinary Committee ('DC') – Complaint on non-payment of balance sum for sale of land – Whether solicitor party to agreement – Whether liability could be cast on solicitor to pay for purchase price – Whether misconduct* E *by solicitor proven – Whether DC properly evaluated all evidence presented – Legal Profession Act 1976, ss. 100(1)(b), 109 & 138*

The appellant was subjected to a disciplinary proceeding under the Legal Profession Act 1976 ('the Act') pursuant to a complaint by the respondents that the appellant had purchased their land and had not paid in full for the F purchase. On receipt of the complaint and pursuant to s. 100(1)(b) of the Act, by letter dated 16 December 2010, the Disciplinary Board ('DB') sought a written explanation from the appellant. The appellant requested for an extension of time which was granted by the DB and by letter dated 2 February 2011, the appellant gave her written explanation. The DB G forwarded the appellant's explanation to the respondents with a request for comments/explanation. However, there was no response from the respondents. By letter dated 7 May 2012, the Disciplinary Committee ('DC') set up by the DB informed the appellant and the respondents that a hearing would be conducted on 28 May 2012. The appellant, stating that she was H down with chicken pox and as such would be unable to bring supporting documents and to present her explanation for the complaint, requested for a hearing date in July. The DC fixed 19 July 2012 as the next hearing date. This date was again adjourned to 25 July 2012 at 2pm, apparently on the appellant's request made *via* telephone 'due to the reason that she was in a I clinic'. However, in its letter dated 20 July 2012, the DC advised the appellant to attend the hearing as scheduled, that 'no further postponement

will be granted' and that the DC 'will proceed to investigate/attend to the matter on the abovesaid date, if you fail to present on the said date'. A copy of the letter was faxed to the appellant but the report indicated the result to be 'Busy'. The DC waited till 3pm and proceeded with the hearing in the absence of the appellant. At the conclusion of the hearing, the DC found that the appellant had breached s. 94(3)(c) of the Act, in that, she 'has committed a serious act of misconduct with elements of dishonesty, deception and fraud in the discharge of her duties as a solicitor'. The DC's recommendations that the appellant be struck off the Roll, were accepted by the DB. The appellant appealed contending, *inter alia*, that (i) she had not been notified of the hearing date; that she was unable to attend since she only received the DC's letter dated 20 July 2012 notifying of the hearing on the day of the hearing itself, at about 3pm to 4pm. The appellant claimed that the letter dated 20 July 2012 was only sent on 23 July 2012. As for the copy sent by fax, the appellant claimed that too, was never received; pointing out that the fax number appearing on the report was not hers. In any event, the report yielded a result of 'busy'; and (ii) the appellant had not been given proper opportunity to present her case, and that the DB was reckless and negligent in not informing her of its intention to impose the penalty under s. 103D of the Act. The appellant's appeal was dismissed by both the High Court and the Court of Appeal. Hence, this appeal by the appellant. The primary points in this appeal were: (i) the issue of s. 109 of the Act; and (ii) whether this was a rare and exceptional case for interference of the DC/DB's findings of facts.

Held (allowing appeal; setting aside decisions of courts below)
Per Mary Lim FCJ delivering the judgment of the court:

(1) The effect of ss. 109 and 138 is that, while the DC may proceed in the absence of the person whose conduct is under inquiry, the DC may only do so after it was satisfied that the person under inquiry had been properly notified of the hearing; that despite such notification, that person had failed to attend the hearing without any reasonable explanation. What is relevant and material is notification before the hearing date, and not on the day itself or worse, after the hearing. The whole object being to ensure attendance at the hearing, that the person under inquiry is given an opportunity to be heard. This right to be heard can only be real and effective if the notification of the hearing is given ahead of the proceedings; anything else will render the right elusive and mere platitude. A breach of this fundamental rule renders the disciplinary proceedings void. (paras 30-32)

(2) The records before the DC did not reveal any attempt on the part of the DC to satisfy itself that the appellant had in fact been served. In the absence of such proof, which would constitute *prima facie* evidence under s. 138, the appellant's claim that she had only received

notification of the hearing on 25 July 2012, in the afternoon of the day of the hearing itself, was credible and supported the appellant's explanation as to why she did not appear on the day of hearing. Telling or advising the appellant to nevertheless attend within the hour, did not meet the terms of ss. 109 and 138. In the circumstances, there was a serious breach of the rules of natural justice rendering the decision reached liable to be impeached. The appellant's absence at the hearing before the DC, through no fault of hers, had seriously undermined her right to be heard, in that, she was also unable to cross-examine any complainant or witness before the DC. The right of cross-examination is statutorily provided in r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 and r. 8 of the Advocates and Solicitors (Disciplinary Inquiry) Procedure Rules 1970. (paras 34, 36, 37 & 39)

(3) The disciplinary proceedings before the DC was not on the basis that the appellant falsified any document, but on the non-payment of the balance sum for the sale of the respondents' land. However, the sale was not between the first respondent and the appellant, but one Jayasimman Jayasingham and the appellant was only involved in preparing the sale and purchase agreements ('SPA'); at least as far as the first SPA was concerned. In fact, the first respondent did not dispute that the signature appearing in the first SPA was his. His dispute was only over who the buyer was, and the contention that he never received any payment including any deposit from anyone, especially the appellant. (paras 61, 64 & 65)

(4) The terms in the first SPA, the validity of which was not challenged, were entirely consistent with the appellant's explanation as to why the second SPA was drawn up. Yet, the DC concluded that there was no explanation from the appellant on the need for a second SPA. The second SPA was between the first respondent, as vendor, and one Mugan Murugiah. The purchase price was RM150,000 and the first respondent accepted RM15,000 as deposit as stipulated in clause 2.1. Unlike the first SPA, the balance of the purchase price, a sum of RM135,000, was acknowledged by the first respondent to had already been paid. The first respondent's signature to the second SPA appeared at the signing page. Absent of any proof to the contrary, the signature was indeed that of the first respondent. Hence, the issue of the identity of the contracting parties ought to have been resolved in the appellant's favour. (paras 67-69)

(5) The inconsistencies pertaining to the amount due in the first respondent's letter of complaint were never cleared up. There was nothing due, as the full purchase price of RM150,000 had already been paid up. Further, the letter of undertaking, which the DC found to have been breached by the appellant, was given by the appellant only in

relation to the clearing of the cheques on the relevant dates. The undertaking was given on the understanding that those sums had already been paid into her firm's account. The appellant's explanation, in her response to the complaint, as to why the payments were stopped, was fair and reflected the general practice. There was no suggestion, at any time, by anyone including the respondents, that the appellant had, as transaction solicitors or as solicitors acting for the purchaser, received the full payment of the purchase price; and that she had refused to pay it over to the respondents. To cast the obligation to pay the purchase price of the sale of the property to the appellant, as solicitors, would be to impose and even change the law of obligations to extend it beyond the contracting parties. In this case, to the transaction solicitors. (paras 72, 73 & 76-79)

(6) The burden of finding misconduct is high, beyond reasonable doubt. In a matter as serious as discipline for misconduct which is liable to lead to the suspension or even striking off an advocate and solicitor from the Roll, there is greater reason for the prescribed rules to be observed and the DC as well as the DB, charged with the responsibility of discipline, to always properly evaluate all evidence presented before rushing into making findings and meting out punishment. None of the appellant's explanation or version of the events appeared to have been properly considered by the DC, or even weighed against the available documentary evidence. Hence, the orders of the courts below including the order of the DB were set aside and the appellant was ordered to be reinstated on the Roll. (paras 80, 83 & 84)

Bahasa Melayu *Headnotes*

Perayu dikenakan tindakan tatatertib bawah Akta Profesion Undang-undang 1976 ('Akta') berikutan aduan responden-responden bahawa perayu telah membeli tanah mereka dan tidak membayar harga belian penuh. Apabila menerima aduan dan menurut s. 100(1)(b) Akta, melalui surat bertarikh 16 Disember 2010, Lembaga Tatatertib ('LT') meminta penjelasan bertulis daripada perayu. Perayu memohon lanjutan masa, yang dibenarkan oleh LT dan melalui surat bertarikh 2 Februari 2011, perayu memberi penjelasan bertulisnya. Lembaga Tatatertib menghantar penjelasan perayu kepada responden-responden dengan permintaan untuk komen/penjelasan, namun, tiada jawapan daripada responden-responden. Melalui surat bertarikh 7 Mei 2012, Jawatankuasa Tatatertib ('JT') yang dibentuk oleh LT memaklumkan pada perayu dan responden-responden bahawa pendengaran akan dijalankan pada 28 Mei 2012. Perayu dengan menyatakan dia terkena cacar air dan oleh itu, tidak boleh membawa dokumen-dokumen sokongan dan mengemukakan penjelasan untuk aduan tersebut, memohon tarikh pendengaran pada Julai. Jawatankuasa Tatatertib menetapkan 19 Julai 2012 sebagai tarikh pendengaran akan datang. Tarikh ini ditangguhkan semula ke 25 Julai 2012 pada pukul 2 petang, atas permohonan perayu yang dibuat melalui telefon

A 'atas alasan dia berada di klinik'. Walau bagaimanapun, dalam suratnya yang bertarikh 20 Julai 2012, JT menasihati perayu hadir semasa pendengaran seperti yang dijadualkan, bahawa 'tiada penangguhan lanjut akan diberikan' dan JT akan 'meneruskan untuk menyiasat/menguruskan perkara tersebut pada tarikh yang dinyatakan, jika kamu gagal untuk hadir pada tarikh yang
B dinyatakan'. Satu salinan surat tersebut dihantar melalui faks kepada perayu tetapi laporan menunjukkan talian 'sibuk'. Jawatankuasa Tatatertib menunggu sehingga 3 petang dan meneruskan dengan pendengaran tanpa kehadiran perayu. Di akhir pendengaran, JT mendapati perayu telah melanggar s. 94(3)(c) Akta, iaitu, dia 'telah melakukan tindakan salah laku
C serius dengan elemen-elemen ketidakjujuran, penipuan dan fraud apabila menjalankan tanggungjawabnya sebagai peguamcara.' Cadangan JT agar nama perayu dibatalkan daripada Daftar. Perayu merayu menghujahkan, antara lain, bahawa (i) dia tidak dimaklumkan tentang tarikh pendengaran; bahawa dia tidak boleh hadir kerana surat JT bertarikh 20 Julai 2012 memaklumkan tentang pendengaran hanya diterima pada hari pendengaran,
D kira-kira pukul 3 hingga 4 petang. Perayu menyatakan bahawa surat bertarikh 20 Julai 2012 hanya dihantar pada 23 Julai 2012. Berkenaan dengan salinan yang dihantar melalui faks, perayu menyatakan itu juga tidak pernah diterima; menyatakan bahawa nombor faks dalam laporan itu bukan kepunyaannya. Walau apapun, laporan menunjukkan keputusan sebagai
E 'sibuk'; dan (ii) perayu tidak diberi peluang yang sewajarnya untuk mengemukakan kesnya, dan LT bertindak semberono dan cuai apabila tidak memaklumkan kepadanya niat untuk mengenakan penalti bawah s. 103D Akta. Rayuan perayu ditolak oleh kedua-dua Mahkamah Tinggi dan atas rayuan, oleh Mahkamah Rayuan. Oleh itu, rayuan ini oleh perayu. Perkara
F utama dalam rayuan ini adalah: (i) isu s. 109 Akta; dan (ii) sama ada ini adalah kes yang jarang dan luar biasa untuk campur tangan dalam dapatan fakta JT/LT.

Diputuskan (membenarkan rayuan;mengetepikan keputusan mahkamah di bawah)

G **Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:**

(1) Kesan ss. 109 dan 138 adalah bahawa, sementara JT boleh meneruskan tanpa kehadiran orang yang tindakannya sedang disiasat, JT hanya boleh berbuat demikian setelah berpuas hati bahawa orang yang sedang disiasat itu dimaklumkan sewajarnya tentang pendengaran tanpa apa-apa
H penjelasan munasabah. Apa yang relevan dan penting adalah pemakluman sebelum tarikh pendengaran, dan bukan pada hari itu sendiri atau lebih buruk lagi, selepas pendengaran. Tujuannya adalah untuk memastikan kehadiran dalam pendengaran, bahawa orang yang sedang disiasat diberi peluang didengar. Hak untuk didengar ini hanya
I boleh direalisasikan dan berkesan jika notis pendengaran diberi terlebih dahulu sebelum prosiding; apa-apa yang lain akan mengakibatkan hak itu sukar diperoleh dan membosankan. Pelanggaran kaedah asas ini menjadikan prosiding tatatertib terbatal.

(2) Rekod di hadapan JT tidak mendedahkan apa-apa cubaan pada pihak JT untuk memuaskan hati bahawa penyerahan dibuat kepada perayu. Tanpa keterangan sedemikian, yang membentuk keterangan *prima facie* bawah s. 138, dakwaan perayu bahawa dia hanya menerima notis pendengaran pada 25 Julai 2015, pada petang hari pendengaran itu sendiri, boleh dipercayai dan menyokong penjelasan perayu mengapa dia tidak dapat hadir pada hari pendengaran. Menyuruh atau menasihati perayu untuk masih hadir dalam masa satu jam, tidak memenuhi terma ss. 109 dan 138. Dalam keadaan itu, terdapat pelanggaran serius keadilan asasi yang mewajarkan keputusan yang dicapai boleh dicabar. Ketidakhadiran perayu semasa pendengaran di hadapan JT, yang bukan disebabkan kesalahannya, menjejaskan dengan serius haknya untuk didengar, iaitu, dia tidak boleh memeriksa balas mana-mana pengadu atau saksi di hadapan JT. Hak untuk memeriksa balas diperuntukkan secara statutori dalam k. 23 Kaedah-kaedah Profesion Undang-undang (Prosiding Tatatertib) (Tribunal Penyiasatan dan Jawatankuasa Tatatertib) 1994 dan r. 8 of the Advocates and Solicitors (Disciplinary Inquiry) Procedure Rules 1970.

(3) Prosiding tatatertib di hadapan JT bukan atas asas perayu memalsukan apa-apa dokumen, tetapi kegagalan membayar baki harga jualan tanah responden-responden. Walau bagaimanapun, jualan tersebut bukan antara responden pertama dan perayu, tetapi seorang yang bernama Jayasimman Jayasingham dan perayu hanya terlibat dalam penyediaan perjanjian jual beli ('PJB'); sekurang-kurangnya setakat yang berkaitan dengan PJB pertama. Sebenarnya, responden pertama tidak mempertikaikan bahawa tandatangan dalam PJB pertama adalah miliknya, apa yang dipertikaikan hanya tentang siapakah pembeli, dan hujahan bahawa dia tidak menerima apa-apa bayaran termasuk apa-apa deposit daripada sesiapa, khususnya daripada perayu.

(4) Kesahihannya terma-terma PJB pertama tidak dicabar dan keseluruhannya konsisten dengan penjelasan perayu mengapa PJB kedua dibuat. Tetapi JT masih memutuskan bahawa tiada penjelasan daripada perayu tentang keperluan PJB kedua. PJB kedua adalah antara responden pertama, penjual dan Mugan a/l Murugiah. Harga belian adalah RM150,000 dan responden pertama menerima RM15,000 sebagai deposit seperti yang dinyatakan dalam kl. 2. Bukan seperti PJB pertama, baki harga belian, sejumlah RM135,000 diakui responden pertama telah dibayar. Tandatangan responden pertama dalam PJB kedua jelas pada muka surat menandatangan. Tanpa apa-apa bukti bertentangan, tandatangan tersebut sememangnya milik responden pertama. Oleh itu, isu identiti pihak-pihak dalam kontrak sepatutnya diputuskan berpihak pada perayu.

(5) Ketidakkonsistenan berkaitan dengan jumlah tertunggak dalam surat aduan responden pertama tidak dijelaskan. Tiada apa-apa yang tertunggak, kerana keseluruhan harga belian sejumlah RM150,000 telah pun dibayar. Selanjutnya, surat aku janji, yang didapati JT dilanggar perayu, diberikan kepada perayu hanya berkaitan dengan penjelasan cek-cek pada tarikh-tarikh relevan. Aku janji tersebut diberi atas persefahaman bahawa jumlah tersebut telah dibayar dengan penuh ke dalam akaun firmanya. Penjelasan perayu, dalam balasan terhadap aduan, tentang mengapa bayaran-bayaran itu dihentikan, adalah adil dan menggambarkan amalan umum. Tiada cadangan, pada bila-bila masa, oleh siapa-siapa termasuk responden-responden, bahawa perayu telah, sebagai peguamcara transaksi atau peguamcara yang bertindak untuk pembeli, menerima bayaran penuh harga belian; dan bahawa dia menafikan untuk membayarnya kepada responden-responden. Untuk meletakkan tanggungjawab membayar harga belian untuk jualan hartanah itu pada perayu, sebagai peguamcara, bermaksud meletakkan, malahan mengubah undang-undang tanggungjawab melampaui pihak-pihak dalam kontrak. Dalam kes ini, peguamcara transaksi.

(6) Beban membuat dapatan salah laku adalah tinggi, melampaui keraguan munasabah. Dalam perkara yang serius seperti tatatertib untuk salah laku yang boleh menjurus pada penggantungan atau pembatalan peguambela dan peguamcara daripada Daftar, terdapat alasan penting untuk kaedah-kaedah yang diperuntukkan dipatuhi dan JT serta LT, yang bertanggungjawab terhadap tatatertib, perlu sentiasa menilai kesemua keterangan yang dikemukakan sebelum terburu-buru membuat dapatan dan mengenakan hukuman. Tiada satu pun penjelasan atau versi perayu jelas dipertimbangkan sewajarnya oleh JT, atau dipertimbangkan terhadap keseluruhan keterangan dokumentar. Oleh itu, perintah-perintah mahkamah di bawah termasuk perintah LT diketepikan dan perayu diperintahkan dimasukkan semula dalam Daftar.

Case(s) referred to:

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC ***(refd)***

Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener) [2018] 2 CLJ 1 FC ***(refd)***

Keith Sellar v. Lee Kwang & Another Appeal [1980] 1 LNS 36 FC ***(foll)***

Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2019] 5 CLJ 139 FC ***(refd)***

Majlis Peguam Malaysia v. Ajmain Abd Rahim [2019] 8 CLJ 614 CA ***(refd)***

Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 ***(refd)***

Rosli Kamaruddin v. How Hock Sing & Anor [2019] 1 CLJ 478 CA ***(refd)***

Vijayarao Sepermaniam v. Suruhanjaya Perkhidmatan Awam, Malaysia [2018] 9 CLJ 141 FC ***(refd)***

Legislation referred to:

Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970, r. 8

Legal Profession Act 1976, ss. 93, 94(3)(c), 95, 96, 97, 98, 99, 100(1)(b), (2), 101, 102, 103, 103A, 103B, 103C, 103D, 103E, 103F, 103G, 103H, 103I, 103J, 104, 105, 106, 107, 108, 109, 110, 111, 138

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 23

For the appellant - M Manoharan; M/s M Manoharan & Co
For the respondents - Abdul Razak Abu Bakar; M/s Rafida Razak & Co
For the intervener - Lee Tze Jiun & Wong Seah Fong; M/s Zairina Loh & Wong

[Editor's note: For the Court of Appeal judgment, please see Sithradevi Nagalingam v. Masdar Darman & Anor; Majlis Peguam Malaysia (Intervener) [2020] 1 LNS 20 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim FCJ:

[1] Amongst the reasons for a trial by one's peers is to ensure that such trial by one's equals will ensure every fairness and justice. The disciplinary mechanism established under Part VII of the Legal Profession Act 1976 ("Act 166") and the Rules made thereunder is no exception. And, so when the appellant found herself the subject of a complaint by one of her erstwhile clients, she believed that she would be accorded the safeguards found from ss. 93 to 111 of Act 166. One of those safeguards is the right to expect the disciplinary proceedings not to proceed in her absence unless of course, she had been duly notified and she, wilfully or unreasonably chose to absent herself.

[2] On 17 May 2014, the appellant was struck off the Roll of Advocates and Solicitors of the High Court of Malaya by the Disciplinary Board which accepted the recommendations of the Disciplinary Committee made on 6 February 2014. The appellant appealed to the High Court. The Bar Council intervened at the High Court.

[3] The appellant was unsuccessful at both the High Court and the Court of Appeal. She then appealed to the Federal Court.

[4] On 29 July 2020, we unanimously allowed her appeal after finding that there were merits in her appeal; that both the courts below had not properly appreciated the underlying facts and that there were just too many unexplained material facts and issues.

[5] We made those important observations when pronouncing judgment for very cogent reasons, and this should become apparent when we examine the underlying facts.

[6] As is the case for all disciplinary proceedings under Act 166, it starts with a complaint. Here, it was the clients' letter dated 30 September 2010 made using the standard "registration form to lodge a complaint/letter of complaint". Both respondents abovenamed were the complainants. At para. 1.4 of the letter of complaint, the respondents gave the following as the particulars of the advocate and solicitor representing them:

> Menjual tanah kepada syarikat guaman Sithra & Partner alamat …
>
> Tarikh perjanjian Bulan Mei 2008
>
> Harga jualan RM400,000
>
> Lokasi tanah …
>
> Bayaran diterima RM100,500 sahaja

[7] At para. 2.5, the respondents gave the following as their instructions to the appellant:

> Saya menjual tanah kepada Sithra & Partners dengan harga RM400,000. Bayaran yang diterima hanya RM100,000 saja. Saya meminta supaya wang baki sejumlah RM300,000 (Ringgit tiga ratus ribu) dan interest yang dijanjikan dalam undertaking letter.

[8] At para. 2.6, the details of what, how or why the respondents "think this lawyer has misconducted himself" (nyatakan butir-butir salah laku peguam) as "seperti salinan repot polis". The police report was attached and this is what is reported by the first respondent:

> Pada pertengahan bulan Mei 2008 saya telah pergi ke syarikat guaman Sithra & Partners alamat … untuk urusan penjualan tanah saya iaitu … Sampai di pejabat peguam tersebut saya diperkenalkan kepada pemilik syarikat guaman iaitu seorang perempuan India nama Sithradevi Nagalingam dan dalam perbincangan beliau bersetuju membeli tanah saya tersebut dengan harga RM400,000.00. Dalam perjanjian jualan tersebut juga beliau telah mengeluarkan satu surat persetujuan pembayaran dari pihaknya kepada saya dan disertakan bersama 3 keping cek CITIBANK … dan beliau berjanji akan menyerahkan surat perjanjian jual beli tanah tersebut dikemudian hari tapi sehingga sekarang beliau gagal berbuat sedemikian. Setelah beberapa hari saya ke Public Bank di … untuk menunaikan cek tersebut. Pihak bank telah bagitahu ketiga-tiga cek berkenaan tidak dapat ditunaikan "Payment Stopped". Saya pergi semula ke pejabat guaman tersebut dan berjumpa dengan perempuan tersebut Sithradevi Nagalingam dan beliau memberi pelbagai alasan dan berjanji membuat bayaran dalam masa terdekat. Beliau juga telah mengeluarkan beberapa lagi cek kepada saya tetapi kesemua cek berkenaan tidak dapat ditunaikan "Payment Stopped". Semenjak dari itu beliau cuba mengelak untuk berjumpa dengan saya panggilan telefonnya juga tidak dijawab. Saya juga telah dimaklumkan di mana syarikat guaman tersebut telah tutup dan pihak mereka membuka satu syarikat guaman baru iaitu … yang beralamat … Saya juga telah jumpa dan menghubungi beliau tetapi

pelbagai alasan diberikan olehnya untuk membuat pembayaran tersebut. Saya telah membuat pemeriksaan pejabat tanah Klang dan mendapati tanah saya tersebut telah ditukarkan kepada nama seorang lelaki India. Tujuan saya buat laporan kerana rasa tertipu dan dipermain-mainkan oleh pihak mereka yang memberi pelbagai alasan untuk menjelaskan bayaran sebanyak RM300,000.00 sehingga memakan masa selama hampir tiga tahun. Datang ke balai buat laporan polis. Sekian, laporan saya.

[9] In essence, the respondents' complaint is that the appellant had purchased their land and had not paid in full for the purchase. One would have thought if that was all there was to the complaint, then, a sale and purchase of this nature would generally be evidenced in writing with the respondents suing the appellant, as purchaser of the subject land, for breach of the sale and purchase agreement. There is no explanation as to why that course of conduct was not at all explored.

[10] On receipt of this complaint and pursuant to s. 100(1)(b) of Act 166, by letter dated 16 December 2010, the Disciplinary Board ("DB") sought a written explanation from the appellant; warning the appellant that if she failed to respond within the time given, the DB would be entitled to proceed to consider the complaint under s. 100(2) and thereafter, make the appropriate decision.

[11] By letter dated 12 January 2011, the appellant sought for an extension of time to provide her written explanation. The DB granted an extension up to 2 February 2011.

[12] By letter dated 2 February 2011, the appellant gave her written explanation. These are her explanations:

I have been introduced by a purchaser named Jayasimman a/l Jayasingham who came to my office in the year 2007 who brought along with him, the vendor of a property known as No … ("the property") namely Masdar bin Darman ("the vendor") together with his brother Samsudin Bin Haji Darman ("the vendor's brother"). The purchaser of the property informed me that he and the vendor wanted to execute a sale and purchase Agreement wherein I acted for the purchaser. A copy of the said Agreement marked as "SN-1".

Subsequently, the vendor has forwarded to me the issue document of title for the property. The purchaser told me that he has paid RM1,500.00 to the vendor and the purchaser told me that he is applying for a bank loan and he will notify me any development for the letter of offer from the bank.

The vendor's brother has been calling me and asked when he can obtain the payment from the sale of the property and when I notified the purchaser, the purchaser told me that he will meet up with the vendor and the vendor's brother.

Subsequently, the purchaser told me that he did not get any bank loan and instead he will arrange for the money to pay to the vendor and later he informed me to prepare a second sale and purchase Agreement and the firm prepared the second sale and purchase Agreement and gave to the purchaser and the purchaser told me that the vendor has executed the second sale and purchase Agreement and than [*sic*] I forwarded to the second purchaser to execute the second sale and purchase Agreement which was given to me earlier by the purchaser. A copy of the said Agreement marked as "SN-2".

In the interim the purchaser informed me to forward some post dated cheques with the understanding that the purchaser will bank in the cash in my company's account which he failed to do and as such I have to take the steps to make stop payment of the cheques given to the vendor's brother.

However, on 07-05-08 the purchaser gave me a sum of RM10,000.00 which has been banked into the vendor's brother's account. Later the purchaser has forwarded a staggered payment in the month of July 2008 totalling of RM86,000.00 which has been banked into the vendor's brother's account, including a Citibank cheque issued to the vendor's brother for the sum of RM45,000.00 in the month of July 2008.

The purchaser later forwarded to me a sum of RM25,000.00 and it has been banked into the vendor's brother's account in the month of August 2008 and progressive payment has been banked in to the vendor's brother's account which totalling to RM133,950.00.

I want to bring to your attention that the purchaser has disappeared for a period of time and I could not contact him and I notified this to the vendor's brother and told him that the purchaser has to settled the balance sum to the vendor as the transaction has been completed and the purchaser had informed me that he will fully settle the outstanding amount from his consultancy fees which he is getting from a company for successfully concluded a deal between the vendor and a purchaser of a different property.

As the vendor's brother has been continuously harassing me to pay the balance sum for the property and in such circumstance I have requested another legal firm namely S. Vinesh & Associates to give an undertaking letter dated 16-01-2009 to release the balance sum progressively upon the released bank loan obtained by my sister and the work for the release of the said bank loan is still in progress and as such I want to bring to your attention that the complaint made against me as baseless and it is premature for the vendor and the vendor's brother to lodge this complaint against me.

[13] Two sale and purchase agreements ("SPA") for the first respondent's property were attached to the appellant's written explanation.

[14] The DB forwarded the appellant's explanation to the respondents with a request for comments/explanation, if any, by 24 February 2011.

[15] No response appears to have been forthcoming from the respondents.

[16] By letter dated 7 May 2012, a Disciplinary Committee ("DC") set up by the DB informed the appellant and the respondents that a hearing would be conducted on 28 May 2012. The appellant requested for an adjournment as she was "down with chicken pox and as such I am unable to bring supporting documents and to present my explanation for the above complaint". The appellant requested for a hearing date in July.

[17] The DC fixed 19 July 2012 as the next hearing date. This date was again adjourned to 25 July 2012 at 2pm, apparently on the appellant's request made *via* telephone "due to the reason that she was in clinic". In its letter dated 20 July 2012, the DC advised the appellant to attend the hearing as scheduled, that "no further postponement will be granted" and that the DC "will proceed to investigate/attend to the matter on the abovesaid date, if you fail to present on the said date". A copy of this letter was faxed to the appellant but the report indicates the result to be "busy" – see p. 120 of the record of appeal.

[18] According to the DC's report (pp. 209 to 215 of the record of appeal), the DC waited till 3pm for the appellant to appear. She did not and so the DC decided to proceed with the hearing. This is what the DC summarised as the respondents' complaints:

> (a) The 1st Complainant have entered into the 1st SPA to sell their freehold land held under … to Jayasimman a/l Jayasingham … at the purchase price of RM400,000.00 only.
>
> (b) *Via* Respondent's letter dated 28/04/2008 (see page 17 of the Record of Complaint), the Respondent undertakes to clear the following Respondent's solicitor's cheques payable to the 1st Complainant:
>
> (i) Cheque No … for a sum of RM20,000.00;
>
> (ii) Cheque No … for a sum of RM20,000.00;
>
> (iii) Cheque No … for a sum of RM360,000.00
>
> (hereinafter collectively referred to "the said Three Cheques") amounting to RM400,000.00 towards full settlement of the purchase price for the said property but the Respondent had stopped the payment of the aforesaid cheques thereafter.
>
> (c) Despite repeated demands, the 2nd Complainant on behalf of the 1st Complainant have only received RM100,500.00 only from the Respondent leaving the balance purchase price of RM295,000.00 yet to be paid till to date. Subsequently the said Property was transferred to Mugan a/l Murugiah on 05/06/2008 pursuant to 2nd SPA which was unknown to the 1st Complainant and the 1st Complainant denied the execution of the 2nd SPA.

[19] The DC took note of the appellant's following explanations:

(a) That the 1st Purchaser in the 1st SPA was unable to get bank loan to finance the purchase.

(b) At the request of the 1st Purchaser, the Respondent then prepared the 2nd SPA at the purchase price of RM150,000.00 to sell the said Property to Mugan a/l Murugiah.

(c) That the 1st Purchaser has disappeared and cannot be contacted by the Respondent.

(d) After harassment by the 2nd Complainant, the Respondent requested another legal firm S. Vinesh & Associates to give an undertaking letter dated 16/01/2009 to the 1st Complainant undertaking to release the sum of RM271,000.00 to the 1st Complainant upon disbursement of the loan sum granted by Public Islamic Bank Berhad to Ushadevi A/P Nagalingam. The said letter of undertaking is annexed herewith as "Exhibit A".

[20] At the conclusion of the hearing, the DC found that the appellant had breached s. 94(3)(c) of Act 166 in that she "has committed a serious act of misconduct with elements of dishonesty, deception and fraud in the discharge of her duties as a solicitor". The DC unanimously recommended that the appellant be struck off the Roll. These were the findings of the DC:

(1) From the facts and evidence adduced, it is obvious that the 1st Complainant has not received the balance purchase price of RM295,000.00 and the payment of the said Three Cheques amounting to RM400,000.00 in total by the Respondent to the 1st Complainant clearly showed that such payments are intended to pay the purchase price for the said Property even after the 2nd SPA.

(2) Further, based on the Memorandum of Transfer (Borang 14A) dated 19/02/2008, the said Property has been transferred to Mugan a/l Murugiah who is not known to the Complainant until a land search was conducted.

(3) The Committee also finds that the 2nd SPA to be dubious on the following reasons:

(a) There were two existing sale and purchase agreements for the same said Property.

(b) The 1st Complainant in his evidence denied the execution of the 2nd SPA and had no knowledge of the same.

(c) The purchase price of the 1st SPA was RM400,000.00 while the purchase price for the 2nd SPA was RM150,000.00.

(d) The 2nd SPA was dated 19/02/2008 with the purchase price of RM150,000.00; however the letter by the Respondent to the Complainant dated 28/04/2008 states that the Respondent undertakes to clear the Three Cheques which amount to RM400,000.00 in total. (see page 17 of the Record of Complaint).

This clearly shows that the purchase price is RM400,000 in accordance with the 1st SPA. Further, the Respondent did not explain the existence of the 2nd SPA and the execution of it by the Vendor in her reply.

(e) The Memorandum of Transfer for the said Property to the Purchaser pursuant to the 2nd SPA was presented for the registration of the transfer on 05/06/2008 and hence the sale herein shall be deem completed. However, till to date the balance purchase price of RM295,000.00 has not been paid to the 1st Complainant.

(4) The Committee finds that there is no explanation by the Respondent on the issuing of the said Three Cheques. Further, the said Three Cheques in favour of the Complainant issued by the Respondent which was stopped payment are the Respondent's firm's Client's Account Cheques.

(5) After the Complainant's repeated demands for the balance purchase price for the said property, the letter of undertaking by S. Vinesh & Associates dated 16/01/2009 was given to the Complainant merely to pacify the Complainant.

(6) In view of the above, the Committee finds that without any valid and reasonable reason the Respondent failed to release the balance purchase price to the Complainant and therefore the Respondent is guilty of misconduct in the discharging of her duties as solicitor.

[21] The recommendations of the DC were accepted by the DB. On 17 May 2014, the appellant was ordered to be struck off the Roll of Advocates and Solicitors of the High Court of Malaya.

[22] The appellant appealed contending *inter alia* that she had not been notified of the hearing date; that she was unable to attend since she only received the DC's letter dated 20 July 2012 notifying of the hearing, on the day of the hearing itself, at about 3pm to 4pm. The appellant claimed that the letter dated 20 July 2012 was only sent on 23 July 2012. As for the copy sent by fax, the appellant claimed that too, was never received; pointing out that the fax number appearing on the report was not hers as her number was 62749779, while the fax identified her number as 62752301. In any event, the report yielded a result of "busy". Her next complaints were that she had not been given proper opportunity to present her case, and that the DB was reckless and negligent in not informing her of its intention to impose the penalty under s. 103D of Act 166.

[23] The High Court was not impressed with any of her complaints, finding that the facts showed the DC "had done its best to afford the appellant every opportunity to be present at the DC's inquiry to enable the appellant to provide her version of the events leading to the sale and purchase of the said property. However, the appellant had blatantly disregarded and/or neglected

and/or ignored the notifications sent to her. Despite a call having been made by the Chairman of the DC himself to impress upon the appellant of the importance of her presence before the DC to state her case, the appellant did not make any efforts to appear and/or to even ask for postponement or provide any valid reasons for being absent from attending the inquiry. Further the appellant had not shown that efforts were made to be present at the place where the inquiry was conducted"; "Despite all opportunities having been given to her to state her case and/or defend the complaint lodged against her she opted not to be present. She had done so at her own peril. Therefore, she could not now turn around and fault the DC and DB for all acts taken against her". The learned judge held that the DC was thus, in the circumstances, entitled to proceed with the inquiry pursuant to s. 109 of Act 166.

[24] The High Court was further disinclined to interfere with the findings of fact by the DC and DB and that in relation to the punishment meted out, found the appellant's case was not a rare and exceptional circumstance warranting the court's intervention. The appeal was thus dismissed.

[25] The position was no less different at the Court of Appeal. This time, the court found that the sole issue was whether the hearing before the DC, conducted in the absence of the appellant, amounted to a serious breach of natural justice as she had not been afforded a reasonable opportunity of being heard; that "the burden to prove misconduct with elements of 'deceit, fraud and dishonesty' must be beyond reasonable doubt"; that with the appellant absent, the burden had not been discharged; that in any case, there was no clear proof that she had wrongly refused to release the balance of the purchase price to the first respondent.

[26] The Court of Appeal agreed with the High Court on non-interference of findings of fact since legislation had entrusted the duty to safeguard and oversee the professional conduct of the profession to the DB; and that the DC had done its best to afford the appellant every opportunity to be present at the hearing to enable her to present her version of the events. The Court of Appeal held that it was well within the DC's jurisdiction under s. 109 of Act 166 to proceed with the inquiry without the appellant's attendance, given that the earlier hearings had been adjourned at her request; that the appellant was estopped from claiming that she had not been given a proper right and opportunity to be heard since she had not rebutted the Chairman of the DC's affidavit asserting that he had called the appellant on the day of the hearing on 25 July 2012 and that the DC had waited an hour before proceeding in her absence.

[27] We will deal with two primary points here: first the issue of s. 109 of Act 166; and the question of whether this was a rare and exceptional case for interference of the DC/DB's findings of fact.

[28] On the first issue, this is what s. 109 provides:

> **If person inquired fails to attend**
>
> 109. If the person whose conduct is the subject of inquiry fails to attend before the Court, or the Disciplinary Committee, as the case maybe, the inquiry or proceedings may be proceeded with without further notice to such person **upon proof of service by affidavit or statutory declaration** or in such other manner as the Court may direct. (emphasis added)

[29] Section 109 must be read with s. 138 of Act 166:

> **Document to be served may be sent by post**
>
> 138. (1) Any document other than the process of court that is required to be served or delivered under this Act may be sent by post.
>
> (2) *A certificate in writing signed by an officer of the Malaysian Bar or the Board, or a member of the Bar Council that any document was properly addressed and posted and setting out the date of posting shall be prima facie evidence of service of the document.*
>
> (3) Any document addressed to an advocate and solicitor at his only or principal address last appearing in the Register of Practitioners shall be deemed to be properly addressed. (emphasis added)

[30] The effect of ss. 109 and 138 is this. While the DC may proceed in the absence of the person whose conduct is under inquiry, the DC may only do so after it has satisfied itself that the person under inquiry had been properly notified of the hearing; that despite such notification, that person has failed to attend the hearing without any reasonable explanation. For this purpose, there must be an affidavit or statutory declaration before the DC showing or proving how service had been effected on the person under inquiry. Where the notification was by post, and that is permitted under s. 138, then a written certificate signed by an officer of the Malaysian Bar or the Board, or a member of the Bar Council that any document was properly addressed and posted and setting out the date of posting may be exhibited in the affidavit or statutory declaration, as the case may be. Where such written certificate is relied on, s. 138 provides that it shall be *prima facie* evidence of service of the document.

[31] Logically and this aspect of the requirement for notification appears to have been missed by all concerned, what is relevant and material is notification before the hearing date, and not, notification on the day itself or worse, after the hearing. The whole object being to ensure attendance at the hearing, that the person under inquiry is given an opportunity to be heard. How can such person be heard or be able to attend the hearing unless and until that person is aware of the hearing date in advance.

[32] This right to be heard can only be real and effective if the notification of the hearing is given ahead of the proceedings; anything else will render the right elusive and mere platitude. This was discussed by this court in *Vijayarao*

Sepermaniam v. Suruhanjaya Perkhidmatan Awam, Malaysia [2018] 9 CLJ 141; [2018] 6 MLRA 263 and we reaffirm that same rule. In our view, a breach of this fundamental rule renders the disciplinary proceedings void.

[33] Where the conditions under ss. 109 and 138 have been met, the DC will then be justified in proceeding with the hearing in the absence of the person under inquiry – that such person has chosen not to attend despite being notified. We can read no other intent or meaning into these two provisions.

[34] The records before the DC, and these are most material as the DB fully endorsed the findings and recommendations of the DC, do not at all reveal any attempt on the part of the DC to satisfy itself that the appellant had in fact been served. There is no evidence of any affidavit, statutory declaration or even written certificate in the terms and purpose of ss. 109 and 138 being available before the DC at the material time. In the absence of such proof, which would constitute *prima facie* evidence under s. 138 the appellant's claim that she had only received notification of the hearing on 25 July 2012 in the afternoon of the day of hearing itself, is credible.

[35] For the hearing of the appellant's appeal before the High Court, the Chairman of the DC affirmed an affidavit relating to the various hearing dates. Exhibit "TTY1" contains four letters from the DC on this and evidence of notification. It is the last letter dated 20 July 2012 which is relevant for this appeal as it is the letter notifying the appellant of the hearing on 25 July 2012. This letter appears at p. 118; it was faxed and posted to the appellant. As far as the earlier mode is concerned, it was faxed at 15:09:42 on 20 July 2012 itself. However, as remarked earlier, the result reads "busy". As for the post, a copy of the letter was sent on 23 July 2012. There is no indication of receipt.

[36] The focus in the courts below on this highly critical issue was not on the terms of s. 109. Rather unfortunately, it was on the DC, through its Chairman, telephoning the appellant at the time of the hearing, and advising the appellant to be present. While that may be fair conduct, it does not alter the fact that the requirements of ss. 109 and 138 must be satisfied. Given that the records adduced by the DC itself do not indicate that a copy of the letter of 20 July 2012 had been successfully faxed to the appellant, it explains and supports the appellant's explanation as to why she did not appear on the day of hearing on 25 July 2012. Telling or advising the appellant to nevertheless attend within the hour, does not, in our estimation, meet the terms of ss. 109 and 138. Certainly, it does not go anywhere near to satisfying the rules of natural justice that demand that a person under inquiry to be afforded a reasonable opportunity to be heard.

[37] We agree with the appellant that in the circumstances, there has been a serious breach of the rules of natural justice rendering the decision reached liable to be impeached. This view was held by Edgar Joseph Jr. J in *Rohana Ariffin v. Universiti Sains Malaysia* [1989] 1 MLJ 487 who opined:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v. Leyland Justices, ex p Hawthorn* [1979] QB 283.

[38] Likewise, the basic tenet of the principle of fairness, or fair play as expressed in the Privy Council decision of *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169, per Lord Denning, at paras. 172 to 173, applies:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.
>
> ...
>
> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal".

[39] We agree with the appellant that her absence at the hearing before the DC through no fault of hers has seriously undermined her right to be heard in that she was also unable to cross-examine any complainant or witness before the DC. The right of cross-examination is statutorily provided in r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 and r. 8 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970.

[40] Rule 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 provides:

23. Right of cross-examination

At any hearing before the Disciplinary Committee:

(a) **the advocate and solicitor concerned may cross-examine the complainant and his witnesses,** if any, in relation to the complaint;

(b) the complainant may cross-examine the advocate and solicitor concerned where he gives evidence, and his witnesses, if any.
(emphasis added)

[41] Rule 8 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 provides:

8. Right of Solicitor concerned to cross-examine

On the date fixed for such hearing and investigation, **the Complainant shall be liable to be cross-examined by the Solicitor concerned on his statement of complaint,** before he is permitted to call his witnesses, if any, who shall also be liable for cross-examination. (emphasis added)

[42] Bearing in mind that the appellant's written explanation was already sent to the respondents before the hearing was convened and the respondents had not deigned it fit to respond or comment, the appellant's loss of opportunity to cross-examine and thus clear up the complaint has wrought her substantial prejudice. The failure to ensure that the appellant had been properly and duly notified of the hearing date before the DC proceeded with the hearing on 25 July 2012 has, in our view, raised questions on whether the burden of proving the case against the appellant had indeed been discharged in the first place.

[43] By analogy, the court would always require proper affidavits of service to be filed proving that a particular party has been duly notified but has failed to attend court before the court pronounces any order, including a default order. Sections 109 and 138 mirror those arrangements and are consonant with the rules of natural justice, which we find have been breached in this instant appeal.

[44] Moving to the second issue of the underlying facts of the complaint; and this is where it gets rather messy.

[45] As alluded to earlier, the appellant's case starts with the complaint. It is not what the respondents or even intervener, before the High Court, in the appeal proceedings, now say that is relevant. It must be the complaint lodged with the Bar Council as the jurisdiction of the DC and the DB emanate from that single complaint, without which there would have been no need for any disciplinary proceedings to begin with.

[46] The respondents' complaint is as per the first respondent's police report – that he sold his property to the appellant, and that the appellant had not paid in full for the purchase. If that was what the complaint is, the issue that arises is whether a complaint of a failure by an advocate and solicitor

to keep to his or her contractual promise or put another way, whether a breach of a personal contract of sale and purchase of property is a matter which necessarily falls within the scope and purview of disciplinary scrutiny under Part VII of Act 166; that such breach amounts to misconduct within the operation and intent of Act 166. We have serious concerns on this issue.

[47] On the assumption that it does, and we say so with much doubt and caution, what evidence was presented by the complainant to meet the case on a standard of beyond reasonable doubt; a burden which the respondents bear. As will become evident, there were disputes over several material matters ie, the identity of the contracting parties, price of the property, and what exactly the terms of sale were. Further, there was this matter of an undertaking apparently given by the appellant, wherein three cheque payments totalling RM400,000 were issued, which payments were subsequently stopped by the appellant, and the reasons behind such action.

[48] Looming large is this question, important, we believe to the legal fraternity – if the appellant was not the purchaser, as explained by her, and there being no allegations that any of the actual purchasers had ever paid over the purchase money for her or her firm to hold or pay to the respondents, why or how then was the appellant accountable or liable to the first respondent. Which part of her conduct in the sale and purchase transaction(s) may it be said that her conduct had fallen below the high standards set by the profession or reasonably expected of a member of the legal profession.

[49] None of these which we see highly relevant to a matter as serious as complaint of misconduct warranting discipline by one's peers, were addressed by the DC.

[50] We pause here to say that we do not, as a general rule, wade into matters of merit and findings of fact. We accept that the profession is best placed to determine the factual context, competing allegations and establish its own proper standards of competence and conduct. At the very minimum, we must be entitled to see evidence of observance of the rules of natural justice, proper and well analysed inquiry into facts, both written and oral. With respect, we find that sorely missing in this appeal and contrary to the views of both courts below, this is a rare and exceptional case warranting our scrutiny.

[51] Returning to the facts and we deal first with the identity of the contracting parties. Were the SPAs between the respondents and the appellant or were it between the respondents and someone else. If it was the latter, what was the appellant's role and how has the appellant misconducted herself such as to warrant being disciplined and struck off the Roll as an advocate and solicitor.

[52] In his affidavit filed in opposition to the appeal, the first respondent claimed that he was under the impression that the appellant was the buyer of his property that he was not aware that at the time when he signed the first

SPA, the appellant was not the buyer but one Jayasimman a/l Jayasingham; that he did not know of Jayasimman till the hearing before the DB when he saw the documents furnished by the appellant; that he never received any payment from Jayasimman or from the appellant. He made this claim too, at para. 1.4 of his complaint – see p. 125.

[53] The written documents evidencing the sale of the subject property were before the DC. These documents were furnished by the appellant in response to the complaint and in support of her explanations.

[54] The respondents' claim on the identity of the purchaser does not appear to have passed muster with the DC as it summarised the respondents' complaint as relating to a sale of the property for RM400,000 to Jayasimman, and not to the appellant – see para. A(a) at p. 210 of the record of appeal. The DC thus accepted the appellant's explanation that the sale was not between the first respondent and her, that she was only involved in preparing the SPAs; at least as far as the first SPA is concerned.

[55] Unfortunately, both the High Court and the Court of Appeal seem to have understood the case as one where "the first respondent who was under the impression that the appellant was the purchaser had unknowingly entered into a sale and purchase agreement to sell a piece of land … to one Jayasimman …" – see para. 1 of the High Court judgment, and para. 4 of the judgment of the Court of Appeal. This misunderstanding of the underlying facts has led to a misappreciation of the case before the court and where the court has not asked itself the right or relevant questions; this will become clearer as we proceed.

[56] In relation to the second SPA, despite learning of its existence at the disciplinary proceedings on 25 July 2012 and denying that he had signed this SPA, the first respondent did not make a police report until about two years later, on 10 September 2014; and then came a series of police reports dated 10 September 2014, 11 September 2014 (two reports of the same date) and 15 September 2014. All these were long after the DB had ordered the appellant struck off the Roll. The DB's order was dated 17 May 2014.

[57] In his report dated 10 September 2014, the first respondent claimed that he never signed any documents pertaining to a sale of his property to Mugan a/l Murugiah; that he "yakin peguam saya telah menyalahgunakan tandatangan milik saya bagi tujuan kepentingannya".

[58] The next day, the first respondent made two reports. In the first of the two reports made on 11 September 2014, the first respondent denied signing the second SPA, stating that his first SPA with Jayasimman a/l Jayasingham was handled by the appellant – "diuruskan oleh peguam bernama Messrs Sithra & Partners"; that the transfer of his property under the second SPA was without his consent and that his signature on the second SPA was false (palsu). In the second of his two reports, the first respondent added that he suspected the appellant "telah meniru tandatangan milik saya".

[59] His fourth report dated 15 September 2014 was to correct the price of the property under the first SPA mentioned in the first of his two reports dated 11 September 2014, that it was RM400,000 and not RM40,000.

[60] It is in the first respondent's police reports that the allegation of falsity of his signature, that the appellant forged his signature in the second SPA, first emerge. The allegations were not made before the DC.

[61] So, it would be fair to say that the disciplinary proceedings before the DC and for that matter, the DB, was not on the basis that the appellant falsified any document. It was about the non-payment of the balance sum for the sale of the respondents' land. Yet, the DC found the second SPA to be "dubious" for reasons expressed at paras. 3(a) to (e) of its report, which we have already set out above.

[62] One of those reasons was the lack of explanation from the appellant on the existence of the second SPA and its execution in her reply. Unfortunately, that is incorrect. Had the DC or anyone read the two SPAs furnished by the appellant, it will become apparent that these documents backed up the appellant's explanation.

[63] In her response to the complaint, the appellant explained that the first purchaser, Jayasimman a/l Jayasingham had told her that he was applying for a bank loan and that he would notify her of "any development for the letter of offer from the bank". She then went on to explain:

> Subsequently, the purchaser told me that he did not get any bank loan and instead he will arrange for the money to pay to the vendor and later he informed me to prepare a second sale and purchase Agreement and the firm prepared the second sale and purchase Agreement and gave to the purchaser and the purchaser told me that the vendor has executed the second sale and purchase Agreement and then [*sic*] I forwarded to the second purchaser to execute the second sale and purchase Agreement which was given to me earlier by the purchaser. A copy of the said Agreement marked as "SN-2".

[64] Although the second SPA seems to have been belatedly challenged, the first SPA dated 22 November 2007 certainly was not. The first respondent did not dispute that the signature appearing in the first SPA is his (see p. 186 of the record of appeal), his dispute is only over who the buyer is, and the contention that he never received any payment including any deposit from anyone, especially the appellant.

[65] Interestingly, the first respondent never claimed that he was illiterate. In any case, the first SPA contains a jurat signed by him, which amongst others, states that the first respondent "has voluntarily executed this instrument" and that he "understand the contents, nature and effects of the document(s) executed by me/us" – see p. 96 of the record of appeal.

[66] According to cl. 3(a) of the first SPA, the balance of the purchase price of RM360,000 (Jayasimman a/l Jayasingham had paid a RM40,000 deposit) was to be settled either by a bank loan or alternatively "the vendor(s) is agreeable and gives automatically his irrevocable consent to the purchaser for the execution of any subsequent agreement between the vendor(s) and the second purchaser(s) for the sale of the said property by the purchaser(s)":

> (a) Subject to the fulfilment by the Vendor(s) of the covenants, undertakings, warranties and agreements to be observed and performed on his part herein, the balance of the Purchase Price amounting to Ringgit Malaysia Three Hundred and Sixty Thousand (RM360,000.00) only hereinafter referred to as "the Balance Purchase Price") shall be paid by the Purchaser(s) to the Vendor(s) in the following manner:
>
> (i) either by loan to be obtained from any bank or financial institution by the Purchaser(s) as stated in Clause E and/or alternatively the Vendor(s) is agreeable and gives automatically his irrevocable consent to the Purchaser for the execution of any subsequent Agreement between the Vendor(s) and the Second Purchaser(s) for the sale and purchase of the said property by the Purchaser(s); and
>
> (ii) the money to be received from such Agreement as stated in subclause (i) above to be forwarded to the Vendor(s) and to be taken towards the account of the Balance Purchase Price to be payable by the Purchaser(s) and any shortfall in the Balance Purchase Price to be payable by the Purchaser(s) as stated in this Agreement within three (3) months from the date of this Agreement (hereinafter referred to as "the Completion Date") or within the extended Completion Date which the Vendor(s) automatically consents to the extended Completion Date subject to the interest at the rate of Eight per centum (8%) per annum calculated on a daily basis until the date of full payment thereof.

[67] These terms, as found in the first SPA, the validity of which is not challenged, are entirely consistent with the appellant's explanation as to why the second SPA was then drawn up. Yet, the DC concluded that there was no explanation from the appellant on why the need for a second SPA.

[68] The second SPA dated 19 February 2008 is between the first respondent, as vendor and one Mugan a/l Murugiah. The purchase price is RM150,000 and the first respondent has accepted RM15,000 as deposit as stipulated at cl. 2.1. Unlike the first SPA, the balance of the purchase price, a sum of RM135,000 is acknowledged by the first respondent to has already been paid – see cl. 3. The first respondent's signature to this second SPA appears at the signing page – see p. 202 of the record of appeal. Without pronouncing on the validity of the various SPAs entered and their

implications, and for the purposes of the disciplinary proceedings, we are nevertheless prepared to say, that absent any proof to the contrary, the signature appearing at p. 202 is indeed that of the first respondent.

[69] Hence, the issue of identity of the contracting parties ought to have been resolved in the appellant's favour. With the documentary evidence in the form of the two SPAs, one would have thought that the proper recourse for the respondents was to sue the relevant purchasers; and not the solicitors, the appellant, who prepared those SPAs. The respondents were turning to the appellant, as solicitors, to meet the contractual obligations arrived at in the SPAs; in particular, to pay for the sale and purchase of the subject property. We do not believe the reach of discipline for misconduct extends to such obligations; it would be misconceived.

[70] The next material factual dispute concerns the payment of the purchase price for the sale. The first respondent claimed that he never received any payment, not even any deposit, whether under the first or second SPA.

[71] Again, this is not borne out by the written terms of both SPAs. At cl. 2.1 of the first SPA (the validity of which is not in issue), the first respondent, as vendor, acknowledged receipt of RM40,000 as deposit for the sale and purchase of the property.

> In consideration of the sum of **Ringgit Malaysia Forty Thousand (RM40,000.00) only** paid by the Purchaser(s) to the Vendors as deposit and towards account of the Purchase Price [the receipt whereof the Vendors hereby acknowledge] … (emphasis added)

[72] In his letter of complaint, the first respondent initially stated that he had received "RM100,500 sahaja" (para. 1.4 at p. 125) but later said it was "RM100,000 saja" (para. 2.5 at p. 126) and that a balance of RM300,000 was due. In the summary of the complaint, it was the whole sum of RM400,000 which was unpaid. This sum differed again at para. 3(e) where the DC found that "till to date the balance purchase price of RM295,000 has not been paid to the first complainant".

[73] None of these inconsistencies were ever cleared up. Going by cl. 3 of the second SPA, there was nothing due as the full purchase price of RM150,000 had already been paid up.

[74] Then, there is the matter of the three post-dated cheques. The appellant had explained that:

> In the interim the purchaser informed me to forward some post dated cheques with the understanding that the purchaser will bank in the cash in my company's account which he failed to do and as such I have to take the steps to make stop payment of the cheques given to the vendor's brother.

[75] The appellant had issued a letter of undertaking dated 28 April 2008. It is this letter which the DC finds the appellant to have breached. The letter states:

> We enclose herewith the following payments and we undertake to clear the aforesaid cheques on the date stated therein:
>
> (a) Cheque No: 611554 dated 05-0502008 sum or RM20,000.00;
>
> (b) Cheque No: 611555 dated 30-05-2008 sum of RM20,000.00; and
>
> (c) Cheque No: 611556 dated 17-06-2008 sum of RM360,000.00.
>
> We will forward to you all the relevant documents on Wednesday 30-04-2008.

[76] In our view, the undertaking which the appellant gave is only in relation to clearing the cheques on the relevant dates. However, the undertaking is given on the understanding that those sums have already been paid into her firm's account.

[77] In the appellant's response to the complaint, she had explained why these three payments were stopped. We are of the opinion that her explanation puts paid to the DC's concerns about the post-dated cheques, that the appellant had issued them on the understanding that the first purchaser, Jayasimman a/l Jayasingham would pay the bank loan into its account. Since the bank loan was unsuccessful, the appellant was entitled to stop the payment on the post-dated cheques that she had issued. Such an explanation is fair and reflects the general practice; we cannot envisage solicitors otherwise paying on behalf of their clients for their clients' contractual dealings.

[78] What seems to have missed everyone's attention is the fact that there is no suggestion, at any time, by anyone including the respondents, that the appellant had, as transaction solicitors or as solicitors acting for the purchaser, received the full payment of the purchase price; and that she had refused to pay it over to the respondents. Had that been the allegation, it would have been in order for the DC to inquire into her conduct and ask for an explanation.

[79] But, the DC found the appellant "without any valid and reasonable reason the respondent failed to release the balance purchase price to the complainants and therefore the respondent is guilty of misconduct in the discharging of her duties as solicitors" – see para. 6 at p. 212 of the record of appeal. How does that even arise, when there is no evidence of any payment of any sum to the appellant to begin with, whether by Jayasimman a/l Jayasingham or the second purchaser, Mugan a/l Murugiah. To then cast the obligation to pay the purchase price of the sale of the property to the appellant, as solicitors, would be to impose and even change the law of

obligations to extend it beyond the contracting parties. In this case, to extend it to the transaction solicitors. We do not agree that this is such a case. Hence, it is with deep concern that we question how the DC could in discharging its obligations under Act 166 then find "the respondent has committed a serious act of misconduct with elements of dishonesty, deception and fraud in the discharge of her duties as a solicitor".

[80] The burden of finding misconduct is high, beyond reasonable doubt. In *Keith Sellar v. Lee Kwang & Another Appeal* [1980] 1 LNS 36; [1980] 2 MLJ 191, the Federal Court in determining the correct burden of proof required in disciplinary proceedings held that:

> Looking at the grounds given in its statement of findings, the Disciplinary Committee although it made firm findings unfortunately did not say expressly what standard of proof it adopted in arriving at its decision.
>
> First, what is the standard of proof required in such proceeding? Very recently, this Court in *Au Kong Weng v. The Bar Committee, State of Pahang* [1980] 2 MLJ 89 dealt with the same question and accepted the standard set by *Bhandari*'s case [1956] 3 All ER 742. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.
>
> The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgment of this Court in *Au Kong Weng*'s case, the Chief Justice said:
>
> > It is a question for the committee to decide, first, whether the acts alleged in the charged had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

[81] This standard of proof has been followed in a long line of authorities such as *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139; *Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Majlis Peguam (Intervener)* [2018] 2 CLJ 1; *Rosli Kamaruddin v. How Hock Sing & Anor* [2019] 1 CLJ 478; and *Majlis Peguam Malaysia v. Ajmain Abd Rahim* [2019] 8 CLJ 614. We see no reason to depart from these cases. On the contrary, we fully endorse the rationale adopted in those cases as to why the burden should be not be on a balance of probabilities but beyond reasonable doubt.

[82] We do not find the burden discharged at all on the facts in this appeal. The documentary evidence tendered by the appellant proves her explanation and her case – that both SPAs were executed by the first respondent willingly

and voluntarily; that there was no evidence of forgery adduced by the respondents to prove the second SPA to be forged; that the appellant was quite entitled to stop payment on the post-dated cheques for the reasons she had explained. How her explanations were regarded by the DC are not evident from the report. On the contrary, there were just too many gaps, inconsistencies and contradictions for the DC to safely and properly proceed. The appellant's explanation of preparing the subsequent letter of undertaking and trying to arrange funds through her sister is, in our opinion, not an indication of culpability. As explained by the appellant, it was after she had been "harassed" by the second respondent, in particular.

[83] None of the appellant's explanation or version of the events appear to have been properly considered by the DC, or even weighed against the available documentary evidence. In a matter as serious as discipline for misconduct which is liable to lead to the suspension or even striking off an advocate and solicitor from the Roll, as it did in this appeal, there is greater reason for the prescribed rules to be observed and the DC as well as the DB, charged with responsibility of discipline, to always properly evaluate all evidence presented before rushing into making findings and meting out punishment.

Conclusion

[84] With these reasons, the appeal was allowed and the decisions of the courts below including the order of the DB are set aside. We further order that the appellant be reinstated onto the Roll as sought at prayers 1 and 2 in her originating summons.